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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 295

ESTATE OF ARTHUR S. DWIGHT, Deceased, BARBARA CHAPIN HAMBY and JOSEPH C. BENSON, Executors, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition For a Writ of Certiorari To The United States Court of Appeals For The Second Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The prevailing and dissenting opinions in the Tax Court (R. 3-18) are reported at 17 T. C. 1317. The opinions in the Court of Appeals (R. 34-41) are reported at 205 F. 2d 298.

JURISDICTION

The judgment of the Court of Appeals was entered on June 3, 1953. (R. 41.) The petition for

a writ of certiorari was filed on August 27, 1953. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether 40% of the corpus of the first trust and all of the corpus of the second trust here involved should be included in the grantor's gross estate for purposes of the federal estate tax under Section 811 (c)(1)(B) of the Internal Revenue Code. The answer depends upon whether the grantor retained the right to have 40% of the income of the first trust and all of the income of the second trust applied towards the support of his wife; and thus retained for his life the possession or enjoyment of, or the right to the income from, the property.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and Regulations involved are set forth in the Appendix, *infra,* pp. 16-21.

STATEMENT

The facts found by the Tax Court (R. 4-10, 19-21, 29-30) may be summarized as follows:

The decedent, Arthur S. Dwight, died on April 1, 1946, a resident of New York. (R. 4.)

On March 15, 1930, the decedent married Anne Howard Chapin. At that time she had six children by a former marriage. All were then adults except one who was 17 years of age, having been born in 1913. From the time of their marriage until the

date of decedent's death, decedent and his wife lived together as husband and wife. Their principal home was at Great Neck, Long Island, although they spent their winters in Florida. (R. 4.)

On December 21, 1931, the decedent transferred the sum of $170,000 to a corporate trustee for the benefit of his wife and six stepchildren. The trust instrument reads in part as follows (R. 5-7):

> FIRST: During the lives of the Grantor and his wife, Anne Howard Chapin Dwight, to hold, manage, and invest the said Trust Fund, to collect the rents, issues, income and profits thereof, and after deduction of the commissions of the Trustee thereon, the Federal and State Income Taxes, if any, and lawful and proper expenses of administration, to pay over and distribute the net income in equal quarterly instalments (the first payment to be within four months from the date of this instrument) to and among the Beneficiaries for their support and maintenance, without power of anticipation, in the following proportions, that is to say:
>
> Forty percentum thereof to the said ANNE HOWARD CHAPIN DWIGHT;
>
> Ten percentum thereof to each of the children of said Anne Howard Chapin Dwight, namely, RUTH CHAPIN, BARBARA CHAPIN HAMBY, HELEN SPRING CHAPIN, CONSTANCE CHRISTY CHAPIN, THOMAS CHRISTY CHAPIN and ANNE HOWARD CHAPIN. Such payments of income to the persons named shall be made on their respective sole receipts (in-

cluding the said Anne Howard Chapin, notwithstanding that she is under the age of twenty-one years), and the Trustee shall not be responsible for the use or application of such income.

SECOND: On the death of any beneficiary during the lives of the Grantor and said Anne Howard Chapin Dwight leaving issue him or her surviving, such issue shall be substituted for its parent so dying as a beneficiary or beneficiaries, and the share of income to which such parent would have been entitled if living shall be paid to such issue or to the surviving parent or guardian, if any, of such issue for the use of such issue if under the age of twenty-one years, in equal shares *per stirpes* until the death of the survivor of the Grantor and said Anne Howard Chapin Wright. If the beneficiary so dying leave no issue him or her surviving, or if such issue die before the death of the survivor of the Grantor and said Anne Howard Chapin Dwight, then the income to which such beneficiary or issue would have been entitled if living shall be added to the shares of income of surviving beneficiaries in the proportions which their respective original shares bear to the aggregate of the shares of all surviving beneficiaries.

THIRD: On the death of the survivor of the Grantor and said Anne Howard Chapin Dwight, the trust hereinbefore created shall terminate and the principal thereof, with any undistributed income shall vest in, and be transferred and paid over in equal shares to

> such of the children above-named of my wife as are then living and the issue of any deceased child *per stirpes,* such issue to take the share which its parent would have taken if living, to their own use and benefit free of any trust.

In 1934, decedent added $25,000 in cash to the principal of this trust. (R. 8.)

On August 15, 1935, the decedent established a second trust. He transferred securities aggregating about $200,000 in principal amount to the same corporate trustee. (R. 8-9, 35.) This trust provided in part as follows (R. 9):

> FIRST: During the life of Anne H. C. Dwight, the wife of the Grantor, to hold, manage, invest and reinvest the said Trust Fund, collect and receive the rents, interest, income and profits thereof, and after deducting all proper charges and expenses, to pay the net income thereof to said Anne H. C. Dwight in monthly installments, for her support and maintenance, without power of anticipation.
>
> SECOND: Upon the death of said Anne H. C. Dwight, the trust hereinbefore created shall terminate and the principal thereof, with any undistributed income shall vest in, and be transferred and paid over in equal shares to such of the following named eight persons as are then living and the issue then living of any of said persons who shall have died, *per stirpes* and not *per capita,* * * *.

At all times during their marriage, the decedent paid all the expenses of running the Long Island

home, and after the first trust was established the wife paid for her own clothing and other personal needs. (R. 10.)

The establishment of the second trust was prompted by the decedent's desire that his wife should have sufficient income to meet both maintenance expenses of the Florida home, which he had presented to her as a gift in 1934, and the substantial medical expenses of caring for her two invalid daughters by her prior marriage. (R. 10.)

One of the stepchildren died in 1945, and thereafter the income of the first trust was distributed in the proportions of 44.45% to Mrs. Dwight and 11.11% to each of her five surviving children. (R. 19-20.)

The Commissioner included the value of the entire corpora of the two trusts in the gross estate for purposes of the federal estate tax. (R. 3-4.) The Tax Court overruled such action of the Commissioner, four judges dissenting. (R. 17-18.)

The Commissioner appealed to the Court of Appeals for the Second Circuit, but limited his contention with respect to the first trust to 40% of its corpus. (R. 36.) Accordingly the Commissioner contended in the Court of Appeals that 40% of the corpus of the first trust and all of the corpus of the second trust should be included in the grantor's gross estate. The Court of Appeals sustained that contention and reversed the decision of the Tax Court, one judge dissenting in part. (R. 40.)

ARGUMENT

1. Section 811 (c)(1)(B) of the Internal Revenue Code (Appendix, *infra*, pp. 16-17) provides for the inclusion in the gross estate of property donatively transferred where the decedent retained for his life or for any period not ascertainable without reference to his death, or for any period which does not in fact end before his death, the possession or enjoyment of, or the right to the income from, the property.

Under both Section 7 of the Technical Changes Act of 1949 (Act of October 25, 1949) (Appendix, *infra*, p. 17) and Section 207 of the Technical Changes Act of 1953, approved August 15, 1953 (Appendix, *infra*, p. 18), this provision is applicable with respect to estates of decedents dying after February 10, 1939, and it applies to transfers made after March 3, 1931; but it is not applicable to a transfer made after March 3, 1931, and prior to June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the Joint Resolution of March 3, 1931 (Appendix, *infra*, pp. 18-19).

In the instant case the decedent died in 1946 and the first trust was established on December 21, 1931, and added to by the decedent in 1934; the second trust was established on August 15, 1935. Hence the initial transfer was made after March 3, 1931, and prior to June 7, 1932, and the

rest of the property was transferred after June, 1932.

It follows that the language of the Joint Resolution is controlling with respect to the initial transfer and the language of Section 811 (c)(1)(B) is controlling as to the rest of the transfers. Both courts below were aware of this, and they both recognized that the slight difference in the language of the Joint Resolution and Section 811 (c)(1)(B) is of no importance to this case. (R. 13, 37.) And see *Hassett* v. *Welch*, 303 U. S. 303, 307. Both Section 811 (c)(1)(B) and the Joint Resolution cover cases where the grantor retained for his life or any period not ending before his death the possession or enjoyment of, or the income from, the property; and as demonstrated below and in the opinion of the Court of Appeals (R. 34-40), we have such a situation here.

Treasury Regulations 105, Section 81.18 (Appendix, *infra*, pp. 19-21) provides in part as follows:

> The use, possession, right to the income, or other enjoyment of the property will be considered as having been retained by or reserved to the decedent to the extent that during any such period it is to be applied toward the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.
>
> If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a cor-

responding proportion of the value of the property should be included in determining the value of the gross estate.

In the instant case, the trust properties in question should be included in the grantor's gross estate under the law and the Regulations if he retained the right to have the income used to discharge his legal obligation to support his wife; and hence reserved the possession or enjoyment of, or the right to the income from, the property. *Helvering* v. *Mercantile-Commerce Bank & Trust Co.*, 111 F. 2d 224 (C. A. 8th), certiorari denied, 310 U. S. 654.

Both the Court of Appeals and the dissenting judges in the Tax Court concluded that he did; and in this connection refer to the dissenting opinion of Judge Raum in the Tax Court, which concisely states the case for the Commissioner as follows (R. 17-18):

> In *Helvering* v. *Mercantile-Commerce Bank & Trust Co.*, 111 F. 2d 224, the Court of Appeals for the Eighth Circuit reversed the decision of this Court in *Estate of Paul F. Donnelly*, 38 B. T. A. 1234. I think that the decision of the Court of Appeals is correct, and that it cannot fairly be distinguished from the present case, at least to the extent that the income from the trusts herein was dedicated to the support and maintenance of the decedent's wife. It is said that the trust provisions in the *Mercantile-Commerce Bank* case gave

> the settlor an "enforceable right" to have the income applied for the support and maintenance of his wife, whereas no such right existed here. But the trust instruments herein definitely called for the payment of income to the wife for her maintenance and support, and it is not accurate to suggest that these provisions were merely hortatory. Surely, if she squandered that income and then sued the grantor for maintenance and support, the existence of these trusts would be a good defense. By establishing the trusts, the decedent effectively discharged his obligation to maintain and support his wife, to the full extent that income therefrom was paid over to her. Thus, by providing for the application of income to the discharge of that legal obligation, he to that extent in fact retained, within the meaning of section 811 (c), "the possession or enjoyment of, or the right to the income from" the property which he transferred in trust.

It is plain from the trust instruments that the decedent retained the right to have the trust income here involved applied toward the satisfaction of his legal obligation to support his wife; and if she had squandered the money and then tried to force him to pay for necessaries she should have purchased with it, he would have had a good defense. *Northeastern Real Estate Secur. Corp.* v. *Goldstein,* 163 F. 2d 963 (C. A. 2d); *Wanamaker* v. *Weaver,* 176 N. Y. 75, 82, 68 N. E. 135. The Court of Appeals recognized this and held (R.

38-39) that since the income in question was to be used to discharge the decedent's legal obligation, he retained its enjoyment and use, and hence the corpus is includible under Section 811 (c)(1)(B). The taxpayers say (Pet. 9-10) that the decedent retained no control over the application of the trust income; but we submit that the wife was not at liberty to disregard the basic purpose for which it was paid to her and the Court of Appeals correctly so held. (R. 38).

We see nothing to the contrary in cases such as *Matter of Wilkening,* 137 Misc. 451, 244 N. Y. Supp. 115, cited by taxpayers. (Pet. 10.) We do not have here an arrangement such as was held to be illegal in *Garlock* v. *Garlock,* 279 N. Y. 337, 18 N. E. 2d 521, cited by taxpayers (Pet. (10); and the instant trusts were designed not to circumvent or place limitations upon the husband's legal obligations to support the wife but rather to serve as an effective instrumentality through which to discharge them. The trust income that was paid to the wife was taxable to the decedent during his lifetime. *Douglas* v. *Willcuts,* 296 U. S. 1; *Old Colony Tr. Co.* v. *Commissioner,* 279 U. S. 716. The amendments to the Code relating to payments of alimony (see Secs. 22(k) and 171 of the Internal Revenue Code, as added by Sec. 120 of the Revenue Act of 1942, c. 619, 56 Stat. 798) are not applicable to the facts at bar. Here there was no divorce or legal separation and the decedent and his wife lived amicably together until he died.

We recognize of course that there was no Congressional intention completely to integrate the income and estate tax laws (*Commissioner* v. *Beck's Estate,* 129 F. 2d 243, 246 (C. A. 2d); *Higgins* v. *Commissioner,* 129 F. 2d 237, 240 (C. A. 1st), certiorari denied, 317 U. S. 658); but in the circumstances of this case where estate tax liability depends upon the reservation of income rights, it seems to be at least of some significance that the trust income properly should have been taxed to the grantor during his lifetime.

In situations such as that here under review, the trust is merely a channel for application of the settlor's income to the discharge of his obligations, and the situation is essentially the same as if the settlor received the income personally and made the payments to his wife directly. And since the decedent was taxable on the income during his lifetime, it would seem clearly to follow that he retained "the possession or enjoyment of, or the right to the income" from the property within the meaning of the law and the Regulations.

The taxpayers undertake (Pet. 11-13) to distinguish *Helvering* v. *Mercantile-Commerce Bank & Trust Co., supra;* but we submit that while there are some differences in the facts, the underlying principle is controlling here and the court below correctly so held (R. 37).

2. The taxpayers also say (Pet. 13-16) that the Court of Appeals erred in holding that extrinsic evidence was inadmissible to show decedent's mo-

tives in establishing the second trust. We submit that the Court of Appeals made no error. The trust instrument plainly and unambiguously provides for the payment of the income to the wife for her support. The parol evidence rule operates to prevent the introduction of evidence which would contradict the terms of a written instrument in a case of this kind. *Pugh* v. *Commissioner,* 49 F. 2d 76, 79 (C. A. 5th), certiorari denied, 284 U. S. 642. In *Helvering* v. *Coleman-Gilbert,* 296 U. S. 369, this Court said (p. 374):

> The parties are not at liberty to say that their purpose was other or narrower than that which they formally set forth in the instrument under which their activities were conducted.

Allen v. *Ruland,* 79 Conn. 405, 65 Atl. 138, stands for the proposition that the plain legal effect of a written instrument which embodies the final agreement of the parties cannot be varied by parol evidence that they did not intend it to be so interpreted, or even expressly agreed that it should have no such effect; and this rule operates in favor of those not parties to the instrument as fully as in favor of those who executed it. Thus, in *Higgins* v. *Smith,* 308 U. S. 473, 477, this Court held that the choice of disregarding an arrangement deliberately chosen by a taxpayer for conducting his affairs lies with the Commissioner and not with the taxpayer. And see *Gray* v. *Powell,* 314 U. S. 402, 414.

Viewed in this light, the decision below seems clearly correct and while it is somewhat hard to reconcile cases such as *Scofield* v. *Greer,* 185 F. 2d 551 (C.A. 5th), and *American Crystal Sugar Co.* v. *Nicholas,* 124 F. 2d 477 (C.A. 10th), cited by taxpayers (Pet. 15), we submit that there is no direct conflict which would justify certiorari here. Moreover, we are here concerned with a trust instrument that was executed under seal in New York in 1935, and apparently under the law of New York it could not have been modified by an unsealed instrument. *Slade's Estate* v. *Commissioner,* 190 F. 2d 689, 691 (C. A. 2d).

Furthermore, even if the evidence in question were admissible, it would not change the result. The family apparently spent every winter in the Florida home (R. 26) and in the circumstances the expenses of maintaining it were not without the scope of the obligations of the decedent who was a man of large means. *DeBrauwere* v. *DeBrauwere,* 203 N. Y. 460, 464-465, 96 N. E. 722; *Hill* v. *Commissioner,* 88 F. 2d 941 (C. A. 8th). As to the medical expenses of the two invalid daughters of the wife by prior marriage, it appears that one of the daughters predeceased the decedent (R. 19) and since the situation in a case of this kind is to be appraised as of the date of death of the decedent, it could hardly be contended that any amount of the trust income was applicable to expenses of that daughter. And, in any event, even if the decedent would not be directly responsible

for supporting adult stepchildren (*People ex rel. Deming* v. *Williams,* 161 Misc. 573, 292 N. Y. Supp. 458), still the mother would certainly be responsible for supporting her own invalid daughters even though they were adults (*Betz* v. *Horr,* 276 N. Y. 83, 86, 11 N. E. 2d 548) and in the circumstances of this case it would seem that such expenses would be within the scope of the decedent's legal duty to his wife (cf. *Hill* v. *Commissioner, supra*).

CONCLUSION

The decision of the Court of Appeals is correct, and there is no direct conflict. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September, 1953.

APPENDIX

INTERNAL REVENUE CODE:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * *

(c) [as amended by Sec. 7(a) of the Technical Changes Act of 1949 (Act of October 25, 1949), c. 720, 63 Stat. 891.] *Transfers in Contemplation of, or Taking Effect at, Death.*—

* * * *

(1) *General Rule.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

* * * *

(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall

possess or enjoy the property or the income therefrom; * * *

* * * *

(26 U. S. C. 1946 ed., Sec. 811.)

Technical Changes Act of 1949 (Act of October 25, 1949), c. 720, 63 Stat. 891:

SEC. 7. TRANSFERS TAKING EFFECT AT DEATH.

* * * *

(b)[1] The amendment made by subsection (a) shall be applicable with respect to estates of decedents dying after February 10, 1939. The provisions of section 811 (c) of the Internal Revenue Code, as amended by subsection (a), shall (except as otherwise specifically provided in such section or in the following sentence) apply to transfers made on, before, or after February 26, 1926. The provisions of section 811 (c)(1)(B) of such code shall not, in the case of a decedent dying prior to January 1, 1950, apply to—

(1) a transfer made prior to March 4, 1931; or

(2) a transfer made after March 3, 1931, and prior to June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).

* * * *

---

[1] Subsection (b) was amended to some extent by Sections 608, 609 of the Revenue Act of 1951, c. 521, 65 Stat. 452, but nothing turns on those amendments here.

Technical Changes Act of 1953, c. 512, 67 Stat. 615:

SEC. 207. EXCLUSION OF CERTAIN TRANSFERS TAKING EFFECT AT DEATH.

(a) *Decedents Dying after February 10, 1939.*—Paragraph (1) of section 811 (c) (relating to the inclusion of certain interests in the decedent's gross estate) is hereby amended by inserting after subparagraph (C) the following:

"Subparagraph (B) shall not apply to a transfer made before March 4, 1931; nor shall subparagraph (B) apply to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516)."

* * * *

(d) *Effective Date.*—The amendment made by subsection (a) shall apply only with respect to estates of decedents dying after February 10, 1939. * * *

Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (c) of section 302 of the Revenue Act of 1926 is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

Treasury Regulations 105, promulgated under the Internal Revenue Code:

Sec. 81.18 [as amended by T. D. 5834, 1951-1 Cum. Bull. 72, 81][2] *Transfers with Possession or Enjoyment Retained.*—(a) *General rule.*—Except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, section 811 (c)(1)(B) requires the inclusion in the gross estate of the value of all property transferred by the decedent, whether in trust or otherwise, if the decedent retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property (1) for his life; or (2) for any period not ascertainable without

[2] This regulation was further amended by T. D. 5936, 1952—2 Cum. Bull. 224, but such amendment is immaterial here.

reference to his death; or (3) for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period. Except as provided in paragraph (b) of this section, such property is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

A reservation for a "period not ascertainable without reference to his death" may be illustrated by a reservation of the right to receive, in quarterly payments, the income of the transferred property where none of the income between the last quarterly payment and the decedent's death was to be received by him or his estate. This expression also includes a reservation of the right to receive the income from transferred property after the death of another person who in fact survived the decedent; but in such a case the amount to be included in the gross estate under this section does not include the value of the outstanding income interest in such other person. However, if such other person predeceased the decedent, the reservation may be considered to be for the decedent's life or for such a period as to evidence his intention that it should extend at least for the duration of his life.

The use, possession, right to the income, or other enjoyment of the property will be considered as having been retained by or reserved to the decedent to the extent that during any such period it is to be applied toward the dis-

charge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.

If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate.

(See section 81.15.)

(b) *Estates of decedents dying before January 1, 1950.*—In the case of a decedent who died before January 1, 1950, property shall not be included in the gross estate under this section unless transferred—

(1) after March 3, 1931, and before June 7, 1932, and the retention or reservation by the decedent was (A) for his life or (B) for such a period as to evidence his intention that it should extend at least for the duration of his life, and his death occurs before the expiration of such period; or

(2) on or after June 7, 1932.

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